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### Appealing a decision

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### **Appealing a decision**

What happens when the losing side in a court case decides it wants to appeal? It's an understandable inclination, especially having gone (typically) through years of protracted negotiation and debate. However, the stresses and strains of the legal process can take its toll on all the participants. For the winning side there will undoubtedly be satisfaction, albeit tempered by an exhausting process; and even if the claimants win, the damage that was the original reason for the claim won't have gone away. For the losing side the decision must seem unbearable, given the expenditure in terms of time, energy, and emotional wellbeing, not to mention money. Can they appeal the decision?

Firstly, it's worth bearing in mind that only a small fraction of clinical negligence claims get as far as a court hearing, and only a small fraction of the ones that do will get as far as an appeal. The losing side may be absolutely convinced of its position, but that is not enough: they must have suitable grounds if they are to extend the legal process.

"You cannot appeal against the lower court's decision just because you think the judge 'got it wrong'." (HM Courts and Tribunals Service 2016)

Eighteen months ago, I reported on a Scottish case which was won by the pursuers (the plaintiffs in England) (Symon 2016). The case concerned a baby born in 1999 with a brachial plexus injury which the original court agreed was the result of negligence on the part of a midwife. The defenders (defendants in England) decided to lodge an appeal. However, an appeal is not simply a re-run of the original court hearing; it is effectively a review of the court's judgement.

"The appeal court does not enjoy the advantage of having seen and heard the witnesses, for example in terms of judging their credibility and reliability... a judge's conclusions on matters of primary fact should be overturned only in those rare cases where it is plain that a mistake has been made. Deference to the trier of fact is the rule, not the exception" (CD v Lanarkshire 2017, per Malcolm LJ @ 23)

In the case of CD v Lanarkshire Acute Hospitals NHS Trust the original hearing was essentially decided on the basis of whether a senior midwife or the parents were to be believed. The defenders

appealed on the grounds that the judge at the original hearing (known as the Lord Ordinary) fundamentally misunderstood parts of the evidence. One of the appeal judges noted:

“For the Lord Ordinary, Sister M was not an impressive witness. There were a number of serious reservations as to her evidence. Her memory of events appeared to improve significantly as the questioning progressed. She was prepared to change her evidence. At the outset she had no recollection of the detail of C’s birth, preferring to rely on a statement she prepared in September 1999. Ultimately she claimed to have a clear recollection” (per Malcolm LJ @ 16).

Those bringing the appeal have to show that the original judge was in error, which sets a very high bar for those challenging a lower court’s decision. Citing the case of Henderson, the appeal court judges carefully set out the kind of scenario that would see an appeal succeed. This might involve

“a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence...What matters is whether the decision under appeal is one that no reasonable judge could have reached” (Reed LJ @67, 62 in Henderson v Foxworth).

In *CD*, the defenders noted that by the time of the birth the baby’s mother had been awake for 24 hours, and had also been given “strong medication”. They claimed that the parents’ evidence went “beyond exaggeration”, and that to prefer their evidence to that of the midwife was a significant error on the Lord Ordinary’s part. They were critical of the Lord Ordinary for stating that the midwife’s account was “anatomically impossible”. During the birth, there was a delay with delivering the shoulders. The midwife claimed to have put the mother into the McRoberts’ position (this was denied by both parents), then stated:

“as I touched the anterior shoulder, the shoulder actually rotated forward and slipped under the pubic arch” (713/4). “I remember this part of the delivery very clearly in my mind” (730).”

The original court hearing heard evidence – which the judge accepted - that the anterior shoulder was impacted behind the symphysis pubis. It concluded that the midwife would not have been able to touch the shoulder, as she claimed. The original court hearing was in 2015, sixteen years after the birth. It is hardly surprising that memories can be unreliable after such a gap, although by the later stages of the hearing the midwife claimed to remember this clearly. It didn’t help that the

contemporaneous records were less than ideal, making it difficult to establish the sequence of events.

The court of appeal considered all of this, and concluded that:

“We are wholly unpersuaded that the Lord Ordinary reached a wrong or unreasonable result. On the contrary, in our view she was more than entitled to conclude that bony impaction was overcome by the use of excessive force in order to achieve C’s delivery. No persuasive criticism has been made of the decision to accept the parents’ evidence as credible and reliable” (Malcolm LJ @ 25).

The courts are reluctant to overturn a decision unless there is evidence of a significant mistake. In the case of CD, the appeal failed because the judges were unpersuaded that the Lord Ordinary was incorrect to believe the parents and not the midwife. For the parents, this prolongation of the legal process cannot have been welcomed. Having been successful in the original hearing, they must have wanted to get on with their lives. The damages they were awarded for the injury to their son’s shoulder and arm was intended to compensate for this significant nerve damage, not reward them for anything else.

It’s hard to imagine, too, what effect this extension of the legal process had on the various practitioners involved, notably the senior midwife who was the subject of criticism at the original hearing. The legal process is not for the faint-hearted. Few practitioners or members of the public who find themselves involved see it as other than stressful (Symon 2001). This case has emphasised the difficulty of bringing an appeal, not least because it relied so heavily on the authority of a single witness whose evidence had been so seriously criticised.

CD v Lanarkshire Acute Hospitals NHS Trust [2017] ScotCS CSIH\_30

Henderson v Foxworth Investments Ltd { [HYPERLINK "http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKSC/2014/41.html"](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKSC/2014/41.html) \o "Link to BAILII version" }.

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